

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1352

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN H. WILSON, JR.,
Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,
Respondent-Appellant.

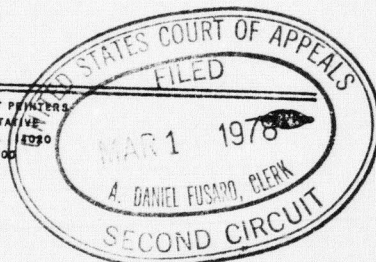
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**PETITION OF THE UNITED STATES OF AMERICA
FOR REHEARING AND SUGGESTION FOR
REHEARING IN BANC**

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v.

UNITED STATES OF AMERICA,
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On Appeal From the United States District Court
For the Western District of New York

**PETITION OF THE UNITED STATES OF AMERICA
FOR REHEARING AND SUGGESTION FOR
REHEARING *IN BANC***

Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc* of the opinion of a panel of this Court (Timbers and Meskill, Circuit Judges, and Lasker, District Judge), filed January 3, 1978, affirming an order of the United States District Court for the Western District of New York (Elfvin, J.), granting Wilson's petition for a Writ of *Habeas Corpus* on the grounds that the District Court "failed to explain to the petitioner the consequences of his guilty plea as it pertained to special parole".

Statement of the Case

On July 30, 1975, an indictment was returned charging Wilson and a co-defendant with possession of heroin with intent to distribute. The trial of the defendants began before Judge Elfvin on September 16, 1975 and ended three days later when the Court declared a mistrial after learning that one of the jurors was familiar with the crime scene.

On September 23, 1975, Wilson pleaded guilty to the indictment. Judge Elfvin addressed the defendant and informed him of the nature of the charge against him, that he had the right to persist in his plea of not guilty and to have his case tried by a jury with the assistance of counsel, and that he had the right to confront and cross-examine the witness against him. Judge Elfvin also advised him that he could be convicted upon his plea of guilty alone without the necessity of any trial. Finally, the judge told Wilson that he would be placed under oath and asked questions about the offense in order to satisfy the Court that there was a factual basis for his plea. The defendant then testified about his involvement in the crime.

At the time Wilson entered the guilty plea, he told the Court that he knew the maximum imprisonment term he faced:

Defendant: Yes, sir, your Honor, you have an option to sentence me up to fifteen years.

Later, there was further discussion regarding the maximum penalty which could be imposed:

Mr. Burns: Perhaps we might state for the record the maximum bounds. The maximum penalty that could be imposed—

The Court: I think I indicated fifteen years.

Mr. Burns: Fifteen years plus a fine of not to exceed \$25,000, and also a mandatory special parole term, if the Court should see fit to impose a term of imprisonment.

The Court: That is right. There is in this situation this tack-on of a mandatory three year probationary period, regardless of what the imprisonment might be. In other words, if I were to sentence you to three years or six years, whatever it would be, in addition to that there would be a servitude of three years of probation after the imprisonment, do you understand that?

Defendant: Yes, sir, your Honor.

When the defendant appeared for sentencing one month later on October 20, 1975, Judge Elfvin said that statements Wilson made to a probation officer were inconsistent with his plea of guilty since the statements suggested the possibility of an entrapment defense. For that reason, over defense and Government objection the plea was vacated and the case was set for trial.

Despite Judge Elfvin's decision, the defendant still wanted to plead guilty. On November 24, 1975, two months after his first guilty plea, the defendant again attempted to plead guilty. Judge Elfvin again complied with the requirements of Rule 11, although he did not state the maximum penalty or discuss the special parole term. Wilson was placed under oath and made admissions which Judge Elfvin found sufficient to provide a factual basis for the plea. Two days later, on November 26, 1975, Wilson was sentenced to five years imprisonment to be followed by a special parole term of six years.

Wilson did not appeal the conviction or sentence. He did write to the judge and requested a clarification or modification of his sentence to allow an early parole. Judge Elfvin denied the request on February 11, 1976.

Almost one and a half years after he pleaded guilty, Wilson filed a "Petition for Appropriate Relief", on March 7, 1977 based upon an alleged change in the parole guidelines after the date of his sentencing. Ten days later, he filed a Motion to

Vacate, Set Aside, or Correct Sentence. In paragraph 12A of the motion, he specified his grounds for relief as follows:

At the time of sentencing the court failed to explain to the petitioner the consequence of his guilty pleas as it pertained to special parole. The sentencing minutes November 26, 1975 make no reference to such an explanation—the court on this date did not discuss the consequence of his guilty plea with regard to the special parole aspect of the sentence.

In neither the Petition nor the Motion did Wilson complain about the length of the special parole term, nor did he claim that he was prejudiced in any way as a result of the judge's explanation about the special parole term, or that he would have acted any differently if the advice had been accurate in all respects.

The Government opposed the petition and cited this Court's decision in *DelVecchio v. United States*, 556 F.2d 106 (2nd Cir. 1977) as controlling.

In an opinion dated August 2, 1977, Judge Elfvin found that "the petitioner was not fully aware of the consequences of his plea of guilty". Relying on this Court's decision in *Ferguson v. United States*, 513 F.2d 1011 (2nd Cir. 1975), Judge Elfvin concluded that Wilson was entitled to have his plea vacated and to plead anew because "the record indicates that (he) was not informed of the applicability and nature of the special parole term prior to pleading guilty". The Court made no mention at all of the *DelVecchio* case which the Government had argued was controlling. The Court made no ruling on the effect of changes in the parole guidelines on Wilson's sentence.

Wilson appeared before Judge Elfvin on September 2, 1977 and pleaded not guilty to the indictment. He was released on bail pending appeal.

Reasons for the Petition

The panel's decision in this case should be reheard, preferably by an *in banc* Court, for two reasons.

First, the panel's decision is plainly contrary to controlling precedent in this Circuit, particularly the decision in *DelVecchio v. United States*, 556 F.2d 106 (2nd Cir. 1977) where this Court held that a defendant is not entitled to have his guilty plea set aside on collateral attack unless he is able to demonstrate specific prejudice to him as a result of any incorrect advice given to him by the Court at the time of the plea.

Second, the panel's decision will only encourage unwarranted and unnecessary litigation by convicted federal prisoners, seeking to set aside their convictions years after pleading guilty on the basis of technical objections which resulted in absolutely no prejudice to them.¹

ARGUMENT POINT

The Panel's Decision in this Case is Incorrect.

The panel decision is in error for three reasons. First, *DelVecchio* is not distinguishable in any material respect from the instant case. Second, the case relied upon by Judge Elfvin and, apparently, by the panel is significantly different from the facts in this case. Third, the defendant has not shown, nor has he ever alleged at any time, that he has suffered any prejudice whatever because of any alleged errors at the time he pleaded guilty.

¹ See opinion of this Court in *DelVecchio, supra* (Feinberg, J.) where the Court took note of the many cases involving attacks on guilty pleas, *Id.* at 107, and the "fertile breeding ground for litigation" afforded by Rule 11. *Id.* at 109.

A. *DelVecchio v. United States* is controlling.

It is true that a mandatory special parole term is a consequence of a guilty plea which must be explained to a defendant when he pleads guilty. If a defendant is not so advised, he may be entitled to withdraw his plea of guilty. *Ferguson v. United States*, 513 F.2d 1011 (2nd Cir. 1975), and *United States v. Journet*, 544 F.2d 633 (2nd Cir. 1976). However, the standards of review on direct appeal and on collateral attack are different.

The defendant has collaterally attacked his conviction pursuant to Title 28, United States Code, Section 2255. To succeed in a 2255 action, the defendant has a substantial burden. In *Davis v. United States*, 417 U.S. 333, 346 (1974), the Supreme Court said:

“ ‘collateral relief is not available when all that is shown is a failure to comply with the formal requirements’ of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was ‘a fundamental defect which inherently results in a complete miscarriage of justice,’ and whether ‘[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent’ ”

Recently, this Court has considered a *habeas corpus* petition with facts quite similar to this case. In *DelVecchio v. United States*, 556 F.2d 106 (2nd Cir. 1977), the defendant pleaded guilty to various narcotics offenses in January 1974. The Court advised him that he could be sentenced to thirty years imprisonment on each of the seven counts to which he pleaded guilty. However, the trial judge did not advise DelVecchio about the mandatory special parole term which must be imposed if the sentence includes a term of imprisonment. The court eventually sentenced DelVecchio to fifteen years imprisonment on one count, and concurrent sentences of five

years on each of the remaining six counts, with a three year special parole term to follow the prison term. DelVecchio did not appeal. Instead, almost two and one half years later, he filed a 2255 action claiming that he was entitled to withdraw his guilty plea because of the Court's failure to advise him of the mandatory special parole term at the time he pleaded guilty. The district court denied the petition and this Court affirmed.

This Court recognized in *DelVecchio* that "on collateral attack, the Court may allow for more play in the joints in assessing the effects of a Rule 11 violation" and "there must be flexibility in the collateral review of a Rule 11 claim"² 556 F.2d at 110-111. The Court then stated the defendant's burden: "*a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation*". *Id.* at 111 (emphasis supplied).

DelVecchio's sentence was 15 years imprisonment and 3 years special parole, substantially less than the total imprisonment he knew he could have received. For that reason, the Court held that DelVecchio was in no way prejudiced by the Court's failure to advise him of the special parole term. He knew at the time he pleaded guilty that he could be imprisoned for 30 years on each count. Because his sentence was less than the maximum which he knew he could receive, there was no prejudice.

² A principal reason for the different standards of review between direct appeal and collateral attack is because "rigid enforcement of the Rule many years after the plea has been taken erodes the principal of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him". *Id.* at 109. This case presents just such a problem since the drug evidence has been destroyed, making prosecution at this point extremely difficult.

DelVecchio and this case are, in every material respect, identical. Wilson was told that he could be sentenced to 15 years imprisonment and a special parole term of 3 years. Judge Elfvin sentenced him to 5 years imprisonment and 6 years special parole. As in *DelVecchio*, Wilson suffered no prejudice whatever since the sentence imposed was substantially less than the sentence he knew he could receive. Even the defendant concedes that Judge Elfvin erred and he cannot prevail on this point. At page 9 of his Brief, he admits that "it would be an exercise of sophistry to argue against the Government's position under this Court's decision in *DelVecchio*".

B. *Ferguson v. United States* is distinguishable.

Even though the Government argued before the district Court that *DelVecchio* was controlling, Judge Elfvin ignored *DelVecchio* entirely, never mentioning the case at all in his opinion.³ The panel's order affirming Judge Elfvin's decision "substantially for the reasons set forth in Judge Elfvin's (*sic*) opinion" simply says, without elaboration, that the panel found *DelVecchio* "clearly distinguishable". Since Judge Elfvin relied heavily on *Ferguson v. United States*, 513 F.2d 1011 (2nd Cir. 1975), the panel must also have been persuaded that the case was controlling.

It is not, since the defendant in *Ferguson* was clearly prejudiced by the Court's failure to advise him of the special parole term. The defendant there was told the maximum sentence he could receive was 10 years. Instead, the court imposed an effective sentence of 13 years, including 6 years imprisonment and 7 years special parole. The panel in *DelVecchio* recognized that the holding in *Ferguson* applied only to

³ In his comments from the bench affirming the District Court's decision, Judge Timbers referred to this omission as "curious".

those cases where the sentence imposed exceeded the maximum sentence of which the defendant has been advised. 556 F.2d at 110.

C. The Defendant has Demonstrated no Prejudice as a Result of the Alleged Errors.

As noted earlier, on this appeal the defendant has abandoned the position he took in the district Court regarding the Court's failure to advise him of the length of the special parole term. Instead, the defendant challenges for the first time other alleged infirmities in the guilty plea process. He now claims that Judge Elfvin's failure to advise him of the maximum penalty he could receive and the special parole term when he pleaded guilty for the second time entitles him to plead anew. This argument should be rejected for two reasons.

First, the defendant has never before in any of the petitions he filed subsequent to his sentencing alleged that he was unaware of the maximum sentence and the mandatory special parole term. To the contrary, the record shows that he was clearly and unequivocally told at the time he entered his first plea of guilty on September 23, 1975 that he could receive a 15 year imprisonment term and a 3 year special parole term. In fact, Wilson himself told the judge that "you have an option to sentence me up to fifteen years".

Second, the defendant has failed to demonstrate any prejudice because of the alleged errors. It is the defendant, not the Government, who has the burden on a 2255 motion. He must demonstrate "prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation". *DelVecchio v. United States*, 556 F.2d at 111.

In another portion of the *DelVecchio* opinion relating to the trial judge's failure to advise the defendant there of his

ineligibility for parole, this Court refused to vacate the guilty plea on that ground, stressing the absence of any "affidavits from petitioner and his then attorney, swearing that petitioner was unaware and uninformed of the parole ineligibility provision and would have acted differently if he had known of it". *Id.* at 113. In this case, neither Wilson nor his attorney submitted any affidavits at any time to support a claim that Wilson was unaware of the sentence he faced, despite the burden on the defendant to show prejudice.

Conclusion

For all of the reasons stated herein, the order of the District Court should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York) John H. Wilson Jr. vs. USA
County of Genesee) 77-1352
City of Batavia)

I, Leslie J. Johnson being
duly sworn, say: I am over eighteen years of age and
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House, Buffalo, N.Y. 14202 Att: Theodore J. Burns Esq.

Asst. U. S. Atty.

Leslie J. Johnson

Sworn to before me this
24th day of February 19 78

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979